IN THE SUPREME COURT OF MISSOURI

No. SC93132

JOHN TEMPLEMIRE,

Appellant,

v.

W&M WELDING, INC.,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
THE HONORABLE ROBERT L. KOFFMAN, JUDGE

SUBSTITUTE BRIEF OF APPELLANT JOHN TEMPLEMIRE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Jury Instructions

Mo Constitution

JURISDICTIONAL STATEMENT

This appeal involves an action for wrongful termination in violation of section 287.780 of the Missouri Workers' Compensation Act. Appellant John Templemire filed his petition against Respondent W&M Welding, Inc. ("W&M"), alleging W&M retaliated against Templemire for filing a workers' compensation claim, in violation of section 287.780. [LF 25]. The case was called for jury trial in Pettis County, Missouri, on September 27, 2011. [Tr. 1]. On September 28, 2011, the jury returned its verdict in favor of W&M. [LF 130]. On September 29, 2011, the trial court, Hon. Robert L. Koffman, entered judgment on the verdict. [LF 82; A1]. On October 27, 2011, Templemire filed a timely motion for new trial arguing the trial court erred in giving M.A.I. No. 23.13 and in refusing to give certain jury instructions offered by Templemire. [LF 83]. On December 15, 2011, the trial court denied Templemire's motion for new trial. [LF 132; A2-3]. Templemire appeals the trial court's judgment and denial of that motion and refusal to reverse the judgment and grant a new trial based on instructional error.

On December 26, 2012, the Missouri Court of Appeals, Western District, issued its opinion affirming the trial court's judgment and denial of Templemire's motion. On February 13, 2013, Templemire filed a timely Application for Transfer in this Court pursuant to Missouri Supreme Court Rule 83.04. On March 19, 2013, this Court sustained Templemire's application and ordered transfer of this appeal. Accordingly, this Court has appellate jurisdiction over this appeal under Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Appellant John Templemire was an employee of W&M Welding, Inc. [Tr. 446-448]. He was hired in October of 2005 as a painter and general laborer for a wage of approximately $8.00 to $8.50 per hour. [Tr. 349, 447-449]. During his employment, Templemire was supervised by Nick Twenter. [Tr. 280]. According to Mr. Twenter, Templemire was a good employee who completed the tasks he was assigned and worked well and efficiently. [Tr. 284]. In fact, Mr. Twenter had no criticism of Templemire's job performance. [Tr. 286].

On January 9, 2006, Appellant Templemire was injured during the course and scope of his employment when a rail fell from a forklift and crushed his foot. [Tr. 459-462]. Templemire was helping secure a large metal railing as it was transported by forklift. [Tr. 461]. While Templemire was holding the railing, the forklift hit a bump, the bump dislodged the railing and the railing fell from the forklift onto Templemire's foot. [Tr. 461]. The weight of the railing split Templemire's shoe, smashing his foot. [Tr. 463]. Templemire's injury required surgeries and the installation of plating and screws into his foot. [Tr. 467]. Templemire reported the injury to W&M and filed a workers' compensation claim. [Tr. 351-352, 369-370]. Templemire's claim was handled by Missouri Employers Mutual insurance and adjuster Liz Gragg. [Tr. 370].

Approximately three or four weeks following his injury, Appellant Templemire was cleared by his doctors to return to work at W&M. [Tr. 468]. He was required to wear a protective boot on his foot during his recovery, including while at work. [Tr. 314-315, 334-335, 489]. Templemire's treating doctor provided him restrictions on what he

was and was not able to do physically because of the injury to his foot. [Tr. 356-359]. Initially, the restrictions required Templemire to wear his protective boot at work and prohibited Templemire from climbing any ladders. [Tr. 356]. The following month, the doctor added a restriction preventing Templemire from driving a vehicle with a clutch. [Tr. 356]. In approximately July 2006, due to continuing problems with the foot injury, Templemire's doctor ordered that Templemire perform seated work only. [Tr. 357]. In September 2006, the seated work restriction was removed, but Templemire was restricted from climbing stairs, pushing/pulling, and was not permitted to stand for more than one hour without taking a 15-minute break. [Tr. 358, 380]. Those were the restrictions in effect on the day of Templemire's termination on November 29, 2006. [Tr. 358-359, 380].

As a result of the work restrictions, W&M assigned Templemire "light duty" tasks upon his return to work. [Tr. 282, 292-293; Exhibit 7; A23)]. W&M assigned Templemire to the tool room for about 30 hours per week, where he cleaned, repaired and checked-in/checked-out tools. [Tr. 468]. Ron Wheeler supervised Templemire in the tool room, and Wheeler testified he had no complaints about Templemire's work during that time. [Tr. 314]. Mr. Wheeler testified Templemire always did what he was asked to do, and was never (to Wheeler's knowledge) disruptive in the workplace. [Tr. 316-317]. Another former W&M employee, Chris Gardner, also described Templemire as a hard worker for W&M. [Tr. 335].

The jury heard evidence that Gary McMullin, owner of W&M, expressed frustration with Templemire's injury and work restrictions. [Tr. 333-335, 338].

Templemire provided testimony that, despite the work restrictions, McMullin required Templemire to drive heavy trucks with clutches. [Tr. 333-335]. Chris Gardner recounted hearing McMullin yelling at Templemire in a demeaning way, including by saying "all you do is sit on your a-- and draw my money." [Tr. 338]. The jury heard evidence that, following Templemire's injury, McMullin directed Templemire be written up for failing to wear a paint mask, something other employees had done without receiving write ups. [Tr. 416-419, 464-465].

The jury also heard from another former W&M employee, Jack Taylor, who testified McMullin would raise his voice and yell at employees who were injured (including Appellant Templemire), and that McMullin had in the past called injured employees "whiners." [Tr. 300, 303]. Mr. Taylor testified he was hit in the face with a beam while on the job at W&M, and although he developed vision problems, W&M never sent him to the doctor. [Tr. 296-298]. In addition, Taylor told the jury W&M refused to accommodate his limitations after his eye was injured on the job, and that McMullin had ridiculed him for his injury. [Tr. 298-299, 302-303]. McMullin denied speaking with Jack Taylor about his injury at any time and testified he never heard any complaints from Taylor. [Tr. 614-617].

W&M Welding, Inc.'s Termination of Appellant Templemire

On November 29, 2006, Appellant Templemire arrived for work at W&M at approximately 6:45 a.m. [Tr. 469]. At that time, Templemire was still on "light duty" and under the work restriction stating he was not permitted to stand for more than one hour without taking a 15-minute break. [Tr. 283, 358, 380]. Nick Twenter, one of

Templemire's supervisors, understood Templemire was supposed to be on light duty that day and that the work he was assigned was to be minimal. [Tr. 283]. Twenter also understood that Templemire should be allowed to take a break and sit down as directed by his doctor. [Tr. 284].

Templemire testified that when he arrived at work, Nick Twenter told him to take some trucks to a service station to be inspected. [Tr. 472-473]. Templemire further testified he was told to drop some materials off at various places in town. [Tr. 474-475]. In addition to those tasks, Templemire explained that Nick Twenter told him a railing was being welded and would be placed in the wash bay for Templemire to wash later that day. [Tr. 470]. Ron Wheeler told Templemire the same thing. [Tr. 470]. The tool room supervisor, Ron Wheeler, told the jury Templemire worked hard the day he was fired. [Tr. 316].

Templemire testified he never saw Gary McMullin that morning and McMullin never directed him to perform any tasks. [Tr. 469-470]. In fact, Templemire testified McMullin never assigned him tasks any time prior to November 29, either. [Tr. 466-467]. Gary McMullin, on the other hand, testified he was the one who specifically ordered Templemire to wash the railing at 7:30 a.m. that morning, and instructed Templemire to complete the task before he did anything else. [Tr. 410-412].

Templemire explained to the jury he completed his morning tasks and the railing was in the wash bay to be washed at approximately 1:50 p.m. that afternoon. [Tr. 477-478]. Templemire was walking to the wash bay intending to wash the railing, but his foot was hurting and he had not rested it in a while. [Tr. 477-478]. So, Templemire walked to

some picnic tables at W&M to sit down and elevate his foot prior to washing the rail. [Tr. 478-479]. Templemire testified when he sat down he saw McMullin for the first time that day. [Tr. 478]. Templemire said McMullin confronted him and began cursing at him because the railing had not been washed. [Tr. 479-480]. Templemire tried to explain to McMullin that he needed to take a break before washing the rail, pursuant to his work restrictions. [Tr. 480-481]. McMullin, however, fired Templemire on the spot without warning. [Tr. 479-480].

Templemire left W&M as directed by McMullin and told his supervisors, Nick Twenter and Ron Wheeler, McMullin had fired him. [Tr. 481]. McMullin never spoke to either of Templemire's supervisors, Wheeler and Twenter, prior to terminating him. [Tr. 281, 316]. W&M had a three-step, progressive discipline policy, and the W&M employee manual stated an employee could receive three write-ups prior to termination. [Tr. 287, 319-320]. Ron Wheeler testified he was not aware of any write ups given to Templemire prior to his termination. [Tr. 320]. The jury heard about another employee—who had not filed a workers' compensation claim—who was not fired after receiving write-ups for leaving work, and who was rehired after previously quitting because he had been using drugs. [Tr. 318-319]. Templemire told the jury he believed he was fired because he had filed a worker's compensation claim after the injury to his foot. [Tr. 488-489].

On November 29, 2006, after he was fired, Templemire called the worker's compensation claims adjuster, Liz Gragg, to explain what had happened and how McMullin had terminated him. [Tr. 390, 518, 520; Exhibit 7; A40]. Following the call

with Templemire, Ms. Gragg called W&M Welding. [Tr. 393; Exhibit 7; A40]. Ms. Gragg's claim center notes, Plaintiff's Exhibit 7 (A40), reflect Ms. Gragg's conversation with Gary McMullin the day Templemire was fired, stating in part:

> Gary stated that he told the IE to wash some parts and the IE refused and he fired him. Told Gary that the IE stated he was taking a break and was going to continue after his break. Gary interrupted me and stated the IE takes break at 3pm. Read the Ie's restrictions to Gary in regards to him needing more frequent breaks. Gary then when on a tyrant [sic] about the IE 'milking' his injury and that he can sue him for whatever reason that is what he pays his premiums for and the attys.

[Tr. 394-395; Exhibit 7; A40].

McMullin told the jury there was a different sequence of events on November 29, 2006, leading up to Templemire's termination. McMullin testified he asked Templemire at 7:30 a.m. that morning to wash the railing so it could be painted and picked up by 4:30 p.m. [Tr. 411]. At approximately 9:30 a.m. that morning McMullin returned from a meeting, but the railing still was not washed. [Tr. 412]. When McMullin confronted Templemire, he testified Templemire claimed he was entitled to a 15-minute break. [Tr. 412-413]. McMullin stated he then terminated Templemire solely for failing to wash the railing in a timely manner. [Tr. 413].

Templemire offered evidence he was out of work for nearly the entire year of 2007 following his termination. [Tr. 452]. The loss of employment resulted in lost wages of

approximately $34,000, and loss of paid vacation, matching 401k, and insurance benefits. [Tr. 453, 459].

Proceedings Following the Close of the Parties' Evidence

W&M moved for a directed verdict at the close of Templemire's evidence, and the trial court denied the motion. [Tr. 549-555]. The trial court further ruled Templemire would be allowed to submit punitive damages to the jury. [Tr. 554-555]. W&M moved for a directed verdict at the close of all the evidence, and the court denied the motion. [Tr. 654-655]. At the close of all the evidence, the trial court held the conference on jury instructions. Templemire first offered a verdict director, M.A.I. No. 23.13 (retaliatory discharge, now M.A.I. No. 38.04)) modified by M.A.I. No. 31.24 (Missouri Human Rights Act, now M.A.I. No. 38.01).[1] [Tr. 655-657; LF 0077; A18; *see also* Tr. 547-550]. Templemire's first verdict director was also modified in accordance with M.A.I. 19.01, instructing that the discharge directly caused or directly contributed to cause damage to Templemire. Id. The specific instruction provided as follows:

> **On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:**

[1] As noted, M.A.I. No. 23.13 and No. 31.24 have been recently withdrawn and all instructions related to employment discrimination have been collected in Chapter 38 of MAI-Civil. In this brief, Appellant Templemire refers to the employment discrimination instructions using the M.A.I. instruction and number in place at the time of trial.

First, plaintiff was employed by defendant, and

Second, plaintiff filed a worker's compensation claim, and

Third, defendant discharged plaintiff, and

Fourth, plaintiff's filing of the worker's compensation claim was a contributing factor in such discharge, and

Fifth, such discharge directly caused or directly contributed to cause damage to plaintiff.

[Tr. 656; LF 0077; A18].

Templemire presented argument to the trial court that the contributing factor standard of M.A.I. No. 31.24 should be used in place of the exclusive causation standard of M.A.I. No. 23.13 based on recent Supreme Court cases interpreting the Missouri Human Rights Act to provide for contributing factor and because there is no requirement in the worker's compensation statute that the filing of a worker's compensation claim be the exclusive cause of the discharge; it can be a contributing factor to be actionable. [Tr. 657-658; *see* LF 0077-78 (citing Fleshner v. Pepose Vision Institute, P.C., 304 S.W.3d 81 (Mo. banc 2010)]. The trial court rejected Templemire's contributing factor instruction, ruling it would give unmodified M.A.I. No. 23.13. [Tr. 656-657; LF 0077].

Templemire then offered M.A.I. No. 23.13, again modified by the contributing factor standard of M.A.I. No. 31.24, but omitting the multiple causes of damage modification of M.A.I. No. 19.01. [Tr. 657-658; LF 0078; A19]. Templemire's offer was based on the same argument supporting the first verdict director offered and rejected by the trial court. [Tr. 657-658]. The instruction provided as follows:

> **On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:**
>
> **First, plaintiff was employed by defendant, and**
>
> **Second, plaintiff filed a worker's compensation claim, and**
>
> **Third, defendant discharged plaintiff, and**
>
> **Fourth, plaintiff's filing of the worker's compensation claim was a contributing factor in such discharge, and**
>
> **Fifth, as a direct result of such discharge plaintiff sustained damage.**

[Tr. 657-658; LF 0078; A19]. The trial court again rejected Templemire's contributing factor instruction, ruling it would give M.A.I. No 23.13. [Tr. 657-658; LF 0078].

Because the court rejected Templemire's contributing factor instructions, and because W&M had taken the position at trial that Templemire was terminated for failing to perform a task, Templemire offered a "pretext" instruction in order to instruct the jury that if they believed W&M's stated reason for termination was not actually the true reason, but rather a pretext, Templemire was entitled to a verdict. [Tr. 658-659; LF 0076; A22]. The instruction read as follows:

> **You may find that plaintiff exercising his workers compensation rights was the exclusive cause of defendant's decision to discharge plaintiff if the defendant's stated reasons for its decision are not the true reasons,**

but are a pretext to hide retaliation against plaintiff for exercising his workers compensation rights.

[Tr. 658-659; LF 0076; A22]. Appellant Templemire argued the instruction was proper because Missouri case law holds that a plaintiff who persuades a jury that the employer's nondiscriminatory reason for discharge is not the true reason, but rather a pretext to hide the wrongful termination, is entitled to a verdict. [Tr. 695; LF 0076 (citing Wiedower v. ACF Industries, Incorporated, 715 S.W.2d 303 (Mo. App. 1986)]. The trial court rejected Appellant Templemire's instruction and did not instruct the jury on pretext. [Tr. 659-660; LF 0076].

The instructions were then read to the jury. [Tr. 663-668; LF 0044-56; A5-17]. The following verdict director, M.A.I. No. 23.13, was given to the jury as Instruction No. 7:

On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a worker's compensation claim, and

Third, defendant discharged plaintiff, and

Fourth, the exclusive cause of such discharge was plaintiff's filing of the workers' compensation claim and

Fifth, as a direct result of such discharge plaintiff sustained damage.

[Tr. 667; LF 0053; A5-17].

During closing argument, W&M argued there was only one issue in the case, and emphasized the jury had to find the **exclusive** cause of Templemire's termination was the filing of the worker's compensation claim. [Tr. 686-689, 697-698]. Counsel for W&M stated:

> Mr. Buckley: You must find the exclusive cause for John Templemire's discharge was the filing of a Workers' Compensation claim.
>
> . . .
>
> Why was John Templemire terminated? Take that question to the jury room. That's the first question you're going to ask.
>
> . . .
>
> This is a simple case. There's one issue in this case. Why did he get fired? That's the gut right there. Why did he get fired? Was the exclusive reason he got fired because he filed a work comp. claim? Well, if it was, he sure didn't give you any evidence of that. He never brought in one person that would say, "John is right. Gary discriminated against him for filing a work comp. claim.
>
> . . .

> There's - - nobody's ever had anything at all. He just wants you to i-n-f-e-r, infer, infer, infer, from all of this evidence, all of this evidence, that he was fired because - - because he filed a Workers' Compensation claim.

[Tr. 686-689, 697-698]. The trial court submitted the case to the jury and the jury retired to deliberate on September 28, 2011. [Tr. 704]. The jury returned its verdict in favor of W&M Welding, Inc. [Tr. 707-708; LF 0080].

On September 28, 2011, the trial court signed its judgment on the verdict, and the judgment was filed on September 29, 2011. [LF 0082; A1]. On October 27, 2011, Templemire filed his Motion for New Trial and Suggestions in Support. [LF 0083-112]. On December 15, 2011, the trial court denied Templemire's motion. [LF 0132; A2-3]. Templemire timely filed his appeal. [LF 0133-136]. After an opinion by the Missouri Court of Appeals, Western District, affirming the trial court's judgment and denial of new trial, this Court granted transfer.

POINTS RELIED ON

I. The trial court erred in refusing Appellant Templemire's verdict directors, which modified M.A.I. No. 23.13 by substituting the "contributing factor" standard from M.A.I. No. 31.24, for the "exclusive cause" language of M.A.I. No. 23.13, and in giving M.A.I. No. 23.13 and the "exclusive cause" instruction, because the "exclusive cause" language of M.A.I. No. 23.13 misstates the law in workers' compensation retaliation cases, in that requiring the jury to find that Templemire's exercise of his workers' compensation rights was the "exclusive cause" of his subsequent discharge is contrary to the language in Section 287.780, RSMo and recent decisions of the Supreme Court of Missouri in Missouri Human Rights Act and public policy wrongful termination cases which hold liability attaches if the prohibited motive was a "contributing factor" in any subsequent discharge.

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81 (Mo. banc 2010)

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. banc 2007)

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998)

Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo. banc 1984)

II. The trial court erred refusing Appellant Templemire's "pretext" jury instruction because omission of the instruction resulted in an instruction package that misstated Missouri law regarding workers' compensation retaliation, in that the jury was not directed that Appellant Templemire was entitled to a verdict if they believed W&M Welding, Inc.'s alleged nondiscriminatory reason for termination was not the true reason for termination, but rather a pretext.

Wiedower v. ACF Industries, 715 S.W.2d 303 (Mo. App. 1986)

Coleman v. Winning, 967 S.W.2d 644 (Mo. App. 1998)

ARGUMENT

I. The trial court erred in refusing Appellant Templemire's verdict directors, which modified M.A.I. No. 23.13 by substituting the "contributing factor" standard from M.A.I. No. 31.24, for the "exclusive cause" language of M.A.I. No. 23.13, and in giving M.A.I. No. 23.13 and the "exclusive cause" instruction, because the "exclusive cause" language of M.A.I. No. 23.13 misstates the law in workers' compensation retaliation cases, in that requiring the jury to find that Templemire's exercise of his workers' compensation rights was the "exclusive cause" of his subsequent discharge is contrary to the language in Section 287.780, RSMo and recent decisions of the Supreme Court of Missouri in Missouri Human Rights Act and public policy wrongful termination cases which hold liability attaches if the prohibited motive was a "contributing factor" in any subsequent discharge.

Standard of Review

"Instructional error may provide a basis for the trial court to grant a new trial." Large v. Carr, 670 S.W.2d 71, 72 (Mo. App. 1984). Instructions shall be given or refused in accordance with the law and the evidence in the case. Mo. R. Civ. P. 70.02(a); McCullough v. Commerce Bank, 349 S.W.3d 389, 397 (Mo. App. 2011). "Well-established law states that an MAI instruction cannot be given if it conflicts with the substantive law." State v. Scott, 278 S.W.3d 208, 213 (Mo. App. 2009).

A party is entitled to a new trial if the instructions contain "defects of substance with substantial potential for prejudicial effect." Kearbey v. Wichita Se. Kansas, 240 S.W.3d 175, 181 (Mo. App. 2007) (*quoting* Mal Spinrad of St. Louis, Inc. v. Karman, Inc., 690 S.W.2d 460, 463 (Mo. App.1985)). Instructions containing the wrong burden or standard of care are presumed prejudicial. *See* Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d 151, 158 (Mo. banc 2000) ("This Court has consistently held that an instruction that imposes upon a party a standard of care higher than that required by law is prejudicial, requiring a new trial . . . [and] [t]he submission of the erroneous instructions in this case . . . imposed an undue burden on [the party] and was prejudicially erroneous."); Syn, Inc. v. Beebe, 200 S.W.3d 122, 134 (Mo. App. 2006) ("The Missouri Supreme Court has consistently held that imposing upon a party a standard of care higher than the law requires is prejudicial, mandating a new trial.").

A. The Trial Court Erred in Refusing Appellant Templemire's Contributing Factor Instruction, And Templemire Was Prejudiced As a Result

Appellant respectfully submits there is a serious problem with the current state of the Missouri case law and jury instructions applicable to claims for workers' compensation retaliation that affects many employees of this state. The problem is that the case law and current jury instruction contain an "exclusive" causal standard that is contrary to the language of section 287.780 and allows discrimination against Missouri employees. Stated differently, the current standard completely deprives employees of the statutory protection they are entitled to.

By statute, Missouri prohibits discharge of, or discrimination in any way against, employees for exercising their rights under the Missouri Workers' Compensation law. *See* § 287.780, RSMo. So, the statute provides a cause of action to employees who have been wrongfully discharged or discriminated against in violation of that statute. Id. The words "exclusively for" or "solely for" do not appear in section 287.780. Yet the current state of Missouri case law is that workers' compensation discrimination and retaliation is **acceptable** so long as it is not the exclusive cause of the employer's action. Accordingly, M.A.I. No. 23.13 instructs the jury to find an exclusive causal relationship between the exercise of workers' compensation rights and the discrimination or discharge in order for a plaintiff to recover.

This current interpretation and application of section 287.780 violates the rules of statutory construction. The language and intent of section 287.780 are simple and clear. An employee who has exercised his or her rights under Missouri's Workers' Compensation law shall be protected from discharge or discrimination by their employers for exercising those rights. The plain language of the statute does not allow employers to discharge or discriminate against employees for filing workers' compensation claims as long as the employer claims an alternative reason played a small part as well. The words **actually** used in the statute establish that discharge or discrimination motivated in any way by the employer's resentment or frustration towards an employee for filing a workers' compensation claim is improper. Accordingly, Appellant Templemire asked the trial court to give the following verdict director, consistent with the language of the statute:

> **On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:**
>
> **First, plaintiff was employed by defendant, and**
>
> **Second, plaintiff filed a worker's compensation claim, and**
>
> **Third, defendant discharged plaintiff, and**
>
> **Fourth, plaintiff's filing of the worker's compensation claim was a contributing factor in such discharge, and**
>
> **Fifth, such discharge directly caused or directly contributed to cause damage to plaintiff.**

[Tr. 656; LF 0077; A18].[2]

Yet, in this case—as in all cases under the current interpretation of section 287.780—the trial court gave a verdict director that prevented Appellant Templemire from receiving a verdict unless the jury believed Templemire's filing of the workers' compensation claim was the exclusive cause of his discharge. After rejecting

[2] Appellant Templemire also asked the trial court to give the verdict director again modified by the contributing factor standard of M.A.I. No. 31.24, but omitting the multiple causes of damage modification of M.A.I. No. 19.01 and, instead, including a fifth paragraph that read: Fifth, as a direct result of such discharge plaintiff sustained damage. [Tr. 657-658; LF 0078; A19].

Templemire's contributing factor instruction, the trial court ruled it would instead give M.A.I. No. 23.13 as Instruction No. 7:

> **On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:**
>
> **First, plaintiff was employed by defendant, and**
>
> **Second, plaintiff filed a worker's compensation claim, and**
>
> **Third, defendant discharged plaintiff, and**
>
> **Fourth, the exclusive cause of such discharge was plaintiff's filing of the worker's compensation claim, and**
>
> **Fifth, as a direct result of such discharge plaintiff sustained damage.**

[Tr. 657-658; LF 0053; A5-17].

Appellant Templemire understands, of course, that the trial court and the parties are bound by the applicable Missouri instruction and the precedent set by this Court. However, Templemire respectfully submits the existing case law on this issue contains erroneous analysis of the applicable statute and it is time for modification and reversal of that case law. There should be no debate that Missouri cannot tolerate workers' compensation discrimination or retaliation. Unfortunately, the current state of the law allows it.

In truth, employees who suffer workers' compensation retaliation cannot enforce their statutory rights under the current "exclusive" causal standard because exclusive

causation is an insurmountable standard. It allows employers to avoid liability by pointing to **anything** other than exercising workers' compensation rights as a basis for termination or discrimination. Put another way, it allows an employer to terminate an employee in large part because he filed a workers' compensation claim, so long as the employer can point to something, no matter how insignificant, as an additional basis for the adverse employment action. There is nothing to stop juries from reading the instruction that way; actually, it is the only way to read it. This results in no protection for employees as required by section 287.780.

Exclusive causation strips section 287.780 of the protections it was meant to provide. Exclusive causation ignores reality, and the fact that retaliation can infect the employers' legitimate motivations and lead to a discharge that would not have otherwise occurred; a wrongful discharge. In truth, absent a direct statement from the employer that the employee is being terminated solely for exercising workers' compensation rights, it provides employers total immunity from statutory liability. In this case, in closing argument, counsel for W&M emphasized the jury could not find exclusive causation because of the lack of a clear admission proving Gary McMullin (owner of W&M Welding) terminated John Templemire solely in retaliation for filing a workers' compensation claim:

> Mr. Buckley: You must find the exclusive cause for John Templemire's discharge was the filing of a Workers' Compensation claim.
>
> . . .

> Why was John Templemire terminated? Take that question to the jury room. That's the first question you're going to ask.
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> . . .
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> This is a simple case. There's one issue in this case. Why did he get fired? That's the gut right there. Why did he get fired? Was the exclusive reason he got fired because he filed a work comp. claim? Well, if it was, he sure didn't give you any evidence of that. He never brought in one person that would say, "John is right. Gary discriminated against him for filing a work comp. claim.
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> . . .
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> There's - - nobody's ever had anything at all. He just wants you to i-n-f-e-r, infer, infer, infer, from all of this evidence, all of this evidence, that he was fired because - - because he filed a Workers' Compensation claim.

[Tr. 686-689, 697-698].

If the employer simply waits for an alternate reason for termination to arise, it can never be liable. In this case, Gary McMullin and W&M Welding, Inc. waited for an

opportunity to fire Templemire for insubordination, without even a prior write up. [Tr. 479-480]. The state of the law should be changed to end this injustice.

The plain meaning of section 287.780, recent opinions handed down by this Court addressing wrongful termination, and the injustice that results from the exclusive causation standard all direct that the Court should align the standard applicable to workers' compensation retaliation with Missouri law's prohibition on other types of employment discrimination. Exclusive causation does not appear in the Missouri Human Rights Act ("MHRA"), and so it is not the standard in discrimination cases under the MHRA. Nor is exclusive causation the standard in cases where employers retaliate against whistleblower employees.

The same should hold true in this case. Exclusive causation does not appear in section 287.780 and this case provides the Court the opportunity to interpret the statute as written and confirm that the exclusive causation standard is contrary to the statute and Missouri's prohibition of wrongful termination. Employees who file workers' compensation claims are entitled to protection from retaliation. *See* § 287.780, RSMo. Exclusive causation robs employees of the protections of section 287.780 and, for these reasons, Appellant Templemire respectfully submits that M.A.I. No. 23.13 misstates the law and the trial court erred in refusing Templemire's contributing factor instruction and, instead, giving M.A.I. No. 23.13.

1. Exclusive Causation Is Contrary to the Plain Language of § 287.780, RSMo

"No employer shall discharge or in any way discriminate against any employee for exercising any of his rights under [Missouri's Workers' Compensation law]." § 287.780, RSMo. In Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81 (Mo. banc 2010), this Court observed that "[n]owhere in the workers' compensation laws does 'exclusive causal' or 'exclusive causation' language appear." Id. at 92.[3] If the exclusive causation standard does not appear anywhere in the statute giving rise to the cause of action, Appellant Templemire submits that it should not appear anywhere in the case law or jury instructions either.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." Kansas City Premier Apartments, Inc. v. Missouri Real Estate Com'n, 344 S.W.3d 160, 166 (Mo. banc 2011). When interpreting a statute, the Court should consider "the purposes the legislature intended to accomplish and the evils it intended to cure." Schilb v. Duke Mfg. Co., 338 S.W.3d 392, 396 (Mo. App. 2011).

[3] Appellant Templemire respectfully submits this observation, and Fleshner's citation (in footnote no. 10) to Judge White's dissent in Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998), signal this Court believes the current standard of exclusive causation is appropriately the subject of re-examination.

The plain language of section 287.780 leaves no doubt the legislature intended to cure the evil of discharge of, or discrimination against, an employee for exercising his or her workers' compensation rights. It should be clear that the legislature intended to prevent an employer—surreptitiously harboring resentment motivated by the filing of a workers' compensation claim—from retaliating against an employee by firing that employee over some routine slip-up that had never before resulted in the immediate termination of anyone. That "lying in wait" tactic is retaliatory discharge for exercising workers' compensation rights, a violation of the statute. Yet under the exclusive causation standard, the jury is prevented from finding for the plaintiff because the employer's reliance on the routine slip-up prevents a finding of exclusive causation. Simply stated, the intent of the statute is defeated by this standard.

Nonetheless, a prior opinion of this Court, Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo. banc 1984), created the exclusive causal standard, holding an employee has a cause of action under section 287.780 when there is "an exclusive causal relationship between plaintiff's actions and defendant's actions." 679 S.W.2d at 275. That standard was again endorsed by this Court in Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998).

Templemire respectfully submits Hansome's interpretation of section 287.780 is incorrect and should no longer be followed. "Workers' compensation law is entirely a creature of statute, and when interpreting the law the court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible." Hayes v. Show Me Believers, Inc., 192 S.W.3d 706, 707 (Mo.

banc 2006). Inserting the non-existent "exclusive causation" language into section 287.780 violates rules of statutory construction. "To read words and concepts into our statutes that the general assembly did not write shows disrespect both for the general assembly and for the common law, which the legislature has the power expressly to displace." Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 69-70 (Mo. banc 2000). If the legislature intended exclusive causation to be the standard, it could have said so. *Compare* § 287.780, RSMo *with* Ala. Code § 25-5-11.1 ("No employee shall be terminated by an employer *solely* because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter) (emphasis added); N.M. Stat. § 52-1-28.2 ("An employer shall not discharge, threaten to discharge or otherwise retaliate in the terms or conditions of employment against a worker who seeks workers' compensation benefits *for the sole reason* that that employee seeks workers' compensation benefits.") (emphasis added). "Sole causation" or "exclusive causation" should not be written into a statute that does not contain those words. Indeed, the statutes state that Chapter 287 is to be strictly construed. § 287.800, RSMo.

In addition to this Court's recent skepticism about the exclusive causation standard in Fleshner, 304 S.W.3d. at 92 (quoted above), Judge White recognized the problem with Hansome's interpretation of the statute in his 1998 dissent in Crabtree v. Bugby, stating:

> [Section 287.780] does not contain any language suggesting that an employee is entitled to an action when they have been discharged "solely" or "exclusively" because they sought the protection afforded by workers'

> compensation. At a minimum, an employee has suffered discrimination when the employee is discharged even in part for filing a claim. To the degree that Hansome v. Northwestern Cooperage Co. compels a different result, it is contrary to the clearly expressed intent of the legislature and should no longer be followed.
>
> . . .
>
> The "exclusive" language in Hansome appears to have been plucked out of thin air.

Crabtree v. Bugby, 967 S.W.2d 66, 74-75 (Mo. banc 1998) (White, J., dissenting). As noted by Judge White, the cases cited and relied upon by the Court in Hansome hold only that under section 287.780 there must be evidence of discrimination; a causal connection between the adverse employment action and the exercise of workers' compensation rights. *See* Davis v. Richmond Special Rd. Dist., 649 S.W.2d 252, 255 (Mo. App. 1983) ("the statute reveals a legislative intent that there must be a causal relationship . . . [and] that the discharge was related to the employee's exercise of his or her rights."; Mitchell v. St. Louis County, 575 S.W.2d 813, 815 (Mo. App. 1978) ("a cause of action lies only if an employee is discharged discriminatorily."). Neither case should be interpreted to support a rule that the causal connection must be "exclusive."

"Hansome was an aberration, and should be treated as such." Crabtree, 967 S.W.2d at 74 (White, J., dissenting). "[W]here it appears that an opinion is clearly erroneous and manifestly wrong, the rule to [sic] *stare decisis* is never applied to prevent the repudiation of such a decision." Sw. Bell Yellow Pages, Inc. v. Dir. Of Revenue, 94

S.W.3d 388, 390-91 (Mo. banc 2002) (*quoting* Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 546 (Mo. banc 1963). This Court has also declared that the rule of *stare decisis* is never applied to prevent the repudiation of decisions that are "destructive of substantive rights." O'Leary v. Illinois Terminal R. Co., 299 S.W.2d 873, 879 (Mo. banc 1957).

Exclusive causation and the current jury instruction are manifestly wrong and destructive of substantive rights. Exclusive causation destroys the protections of the statute and the instruction is erroneous because it requires the jury to return a verdict in favor of the employer even though the employer has engaged in discrimination. This Court recently wrote about the injustice created by exclusive causation in Fleshner, 304 S.W.3d 81, recognizing that an employee who engaged in protected activity could be terminated "without consequence" by the employer:

> Upon a lawsuit alleging wrongful termination . . . the employer could assert that, while the [protected activity] played a part in the decision to terminate, the employee was also terminated for another reason, such as reporting for work late or failing to follow the dress code. "Exclusive causation" would result in an exception that fails to accomplish the task of protecting employees . . . .

Fleshner, 304 S.W.3d at 93. Furthermore, in rejecting application of the exclusive causal standard to Missouri's public-policy exception to the at-will employment doctrine, this Court opined that an employer's actions are "reprehensible" if the improper motive plays **any** part in the employer's decision to terminate an employee. Id. at 94-95.

Simply put, post-Hansome and post-Crabtree this Court has declared that exclusive causation allows reprehensible conduct and fails to accomplish the task of protecting employees. The fact that the current state of the law on workers' compensation retaliation allows reprehensible conduct and fails to accomplish the task of protecting employees (because it requires exclusive causation) is an injustice and defeats the intent of the plain language of section 287.780. Even the majority in Crabtree recognized that precedent should be overturned if necessary to remedy "recurring injustice or absurd results." Crabtree, 967 S.W.2d at 71-72.

"[T]he doctrine of stare decisis has not been followed where a palpable wrong or injustice would be done, or where the mischiefs to be cured far outweigh any injury that might be done in the particular case by overruling prior decisions." Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47, S.W. 944, 946 (Mo. 1898). Less harm would result from overruling and abandoning the exclusive causation standard than from continuing to deny employees the rights afforded by the plain language of the statute and allowing what this Court has described as "reprehensible" conduct. *See* Fleshner, 304 S.W.3d at 94.

Appellant Templemire respectfully requests that this Court take the action advocated by Judge White in his Crabtree dissent and hold that 1) the exclusive causation standard is contrary to the plain language of section 287.780 and the intent of the legislature and 2) that Hansome should no longer be followed. Section 287.780 prohibits an employer from "discharg[ing] or in any way discriminat[ing] against an employee" for exercising workers' compensation rights. *See* § 287.780, RSMo (emphasis added). This

is clear language that illustrates the intent to protect employees from **any** adverse action caused in any way by the filing of a workers' compensation claim. The applicable M.A.I. instruction misstates the law and the trial court erred in rejecting Appellant Templemire's contributing factor instruction and instead instructing the jury that it must find exclusive causation in order to find for plaintiff.

2. Exclusive Causation Conflicts with Recent Supreme Court Opinions On Missouri's Prohibition of Discrimination and Retaliation in the Workplace

Not only is an exclusive causation standard contrary to the plain language of section 287.780, it conflicts with the causal standard currently applied in other types of employment discrimination and wrongful discharge claims under Missouri law. In recent years, this Court has revisited the appropriate causal standard for claims of discrimination and wrongful discharge in violation of the MHRA and in violation of Missouri public policy. In Fleshner (2010) and Daugherty (2007), this Court held that the contributing factor standard shall apply to claims under Missouri's public policy protection of employees and to claims under the MHRA. The language of the MHRA and the standard adopted by this Court for the public policy exception are markedly similar to the language providing the cause of action for workers' compensation retaliation. If the language providing the causes of action is the same, the causal standard must be the same. There is no basis on which to distinguish claims in those areas of law from claims

for workers' compensation retaliation under section 287.780. Each seeks to remedy illegal conduct by employers.[4]

Under the MHRA, discrimination includes "'***any*** unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment." Daugherty v. City of Maryland Heights, 231 S.W.3d at 819 (emphasis in original); 213.030, RSMo. In Daugherty, this Court held that a "contributing factor" standard for claims of discrimination or wrongful termination under the MHRA is consistent with the plain meaning of the statute, which prohibits employers from discriminating against employees because of certain protected characteristics, such as race, gender, or age. 231 S.W.3d at 819-820; § 213.055, RSMo. The Court recognized that "[n]othing in the statutory language of the MHRA requires a plaintiff to prove that discrimination was a substantial or determining factor in an employment decision." 231 S.W.3d at 819. Instead, "[i]f consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient." Id.

Similarly, section 287.780 provides that no employer shall discharge or "**in any way discriminate against**" an employee who has exercised his workers' compensation rights. If statutory prohibition of **any** unfair treatment under the MHRA requires a contributing factor standard, there is no explanation for requiring an exclusive casual standard to the prohibition of discriminating against an employee in **any** way for exercising workers' compensation rights.

[4] Appellant notes that each are now collected, together, in Chapter 38 of MAI-Civil.

In 2010, in Fleshner v. Pepose Vision Inst., P.C. this Court rejected the use of the exclusive causation standard for claims alleging wrongful termination in violation of public policy. Fleshner, 304 S.W.3d at 91-92 (again, also recognizing that "[n]owhere in the workers' compensation laws does 'exclusive causal' or 'exclusive causation' appear."). The Court held that the "contributing factor" standard was also appropriate for claims alleging wrongful discharge in violation of public policy, stating, "if an employee reports violations of law or refuses to violate the law or public policy as described herein, it is a 'contributing factor' to the discharge, and the discharge is still reprehensible regardless of any other reasons of the employer." Id. at 93-95. The Court's analysis in Fleshner was that the contributing factor analysis applies when an employee is terminated "**for** refusing to violate the law or any well established and clear mandate of public policy" or "**for** reporting wrongdoing or violations of law to superiors or public authorities." Id. at 92 (emphasis added). The current state of the law in the workers' compensation context directly conflicts with this analysis and holding, because exclusive causation is required in the workers' compensation context even though the employee is discharged or discriminated against "**for** exercising any of his rights under this chapter [Chapter 287]." § 287.780, RSMo (emphasis added).

These recent cases—handed down after the drafting of M.A.I. No. 23.13 and after the exclusive causation opinions in Hansome and Crabtree—signal that the critical determination in wrongful termination cases should be "whether an illegal factor **played a role** in the decision to discharge the employee." Fleshner, 304 S.W.3d at 94 (emphasis added). If an illegal factor plays a role in an employee's discharge, the employer has

engaged in discrimination; the illegal factor is "a 'contributing factor' to the discharge, and the discharge is still reprehensible regardless of any other reasons of the employer." Id. at 93-95. How could the reasoning in workers' compensation cases possibly be any different? Discrimination against an employee for his or her exercise of workers' compensation rights is just as illegal as discrimination on the basis of age, race, sex or an employee's refusal to violate the law.

Because exclusive causation allows an employee who engaged in protected activity to be terminated "without consequence" by the employer (Fleshner, 304 S.W.3d at 93), exclusive causation amounts to approval of employers' practice of "creating" slip-ups or waiting opportunistically for the first moment to criticize and terminate an employee who, prior to filing for workers' compensation, was free from criticism. Simply stated, exclusive causation allows discrimination. The injustice created by exclusive causation, coupled with the fact that the exclusive causal standard has been held to be unacceptable in other areas of employment discrimination, demonstrates a compelling reason for abandoning the standard in favor of the contributing factor standard. *See* Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633, 644 (Mo. banc 2012) ([T]he passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.").

It is time for the Court to bring the causal standard in workers' compensation retaliation cases in line with the standard used in other wrongful termination cases. The plain language of section 287.780 calls for it, and there is no valid reason to distinguish the protections of that statute from the protections provided to workers under the other

exceptions to the employment-at-will doctrine. If the filing of a workers' compensation claim was a "contributing factor" to the discharge, the employer's actions are illegal and the employer has violated the plain language of section 287.780.

3. Appellant Templemire Was Prejudiced By the Exclusive Causation Instruction

The exclusive causation instructional error was prejudicial to Appellant Templemire in this case, just as it is prejudicial to plaintiffs in every case. It is prejudicial because it requires plaintiffs to prove the causal element of their case by an insurmountable standard. It is prejudicial because it confines plaintiffs to the argument that the employer terminated the employee because—and only because—the employee filed a workers' compensation claim. It is prejudicial because it allows employers to treat an employee differently because of filing a workers' compensation claim, as long as the employer also points to some additional reason for the adverse action, such as insubordination. Put simply, it is prejudicial because it effectively gives immunity to employers who discriminate, who have violated the law, and who would be liable under a "contributing factor" standard. That is what happened to Appellant Templemire in this case.

In this case, Templemire presented evidence from which the jury could find that W&M Welding retaliated against Templemire for filing a workers' compensation claim because the claim was a contributing factor in the termination. Templemire presented evidence he filed a workers' compensation claim and was placed on work restrictions by his doctor. [Tr. 351-352, 356-359, 369-370, 459-463]. Templemire presented evidence

W&M Welding subsequently expressed frustration with Templemire and retaliated, including by making Templemire drive heavy trucks with clutches that aggravated Templemire's foot injury. [Tr. 333-335]. The jury heard from another former employee, Jack Taylor, who testified Gary McMullin called injured employees "whiners," and that W&M refused to accommodate Jack Taylor's limitations after Mr. Taylor injured his eye on the job. [Tr. 296-303].

The jury heard evidence that, following Templemire's filing of the workers' compensation claim, McMullin directed that Templemire be written up for failing to wear a paint mask, something other employees had done without receiving write ups. [Tr. 416-419, 464-465]. Former employee Chris Gardner told the jury McMullin would yell at Templemire in a demeaning way, including by saying "all you do is sit on your a-- and draw my money." [Tr. 338]. Templemire presented evidence that on November 29, 2006 Mr. McMullen fired Templemire on the spot and without prior warning and without talking to Templemire's supervisors while Templemire was taking a break and elevating his foot, pursuant to doctor's orders. [Tr. 281, 316, 479-480].

Mr. McMullin's stated reason for the termination was "insubordination." [Tr. 413]. But Templemire testified that he was going to perform the task, he just needed to rest his foot for a few minutes in order to alleviate his pain, pursuant to his work restrictions. [Tr. 478-481]. In fact, Mr. McMullin's on-the-spot termination of Templemire without any prior warning or write up was contrary to W&M's progressive discipline policy, a copy of which was presented to the jury. [Tr. 287, 319]. Templemire also presented evidence that another employee who had not filed a workers'

compensation claim was given three write ups under the discipline policy for **leaving work** early without permission, prior to any termination. [Tr. 318-319].

Finally, Templemire testified that when he was terminated Mr. McMullin cursed at him, saying he was tired of hearing about Templemire's injured foot. [Tr. 479-480]. Templemire's account of that conversation was corroborated by perhaps the most compelling piece of evidence illustrating W&M's motivation for Templemire's firing, the claim notes taken by W&M's workers' compensation insurer during a conversation with Mr. McMullin the day Templemire was fired. [Exhibit 7; A40]. The claim notes clearly state that Mr. McMullin was angry and frustrated with Templemire "milking his injury," stating in part:

> Gary stated that he told the IE to wash some parts and the IE refused and he fired him. Told Gary that the IE stated he was taking a break and was going to continue after his break. Gary interrupted me and stated the IE takes Break at 3pm. Read the Ie's restrictions to Gary in regards to him needing more frequent breaks. Gary then when on a tyrant [sic] about the IE 'milking' his injury and that he can sue him for whatever reason that is what he pays his premiums for and the attys.

[Tr. 394-395; Exhibit 7; A40]. The foregoing is substantial evidence that workers' compensation retaliation contributed to and motivated W&M's termination of Templemire. The proper instruction, modeled after M.A.I. No. 31.24, would have allowed Templemire to argue to the jury that Templemire's filing of a workers' compensation claim was a contributing factor in his discharge, and would have allowed

the jury to find for Templemire. If this was an age discrimination case and the claim note said that, following the termination, the employer "went on a tirade about the employee milking his old age" and any benefits provided to older workers, would there be any question that that the employer violated the Missouri Human Rights Act?

Instead, because this is a workers' compensation retaliation case, the employer is not liable. The "exclusive" causal standard of M.A.I. No. 23.13 handcuffed Templemire to an argument that the retaliation was the **sole** cause of the termination; if there was any evidence to the contrary, Templemire's claim failed. The instructions prevented the jury from finding for Templemire if the jury believed "insubordination" or some other reason played just a nominal part in the W&M's decision. Because McMullin testified Templemire was terminated because he was "insubordinate," the exclusive causal standard prevented the jury from finding W&M liable, despite the fact that the weight of the evidence indicated W&M violated the statute and retaliated against Templemire. Accordingly, W&M's counsel emphasized exclusive causation in closing:

> Mr. Buckley: You must find the exclusive cause for John Templemire's discharge was the filing of a Workers' Compensation claim.
>
> . . .
>
> Why was John Templemire terminated? Take that question to the jury room. That's the first question you're going to ask.

[Tr. 686-689].

In other words, Templemire was prejudiced because the instruction required a higher standard than required by the plain language section 287.780. Instructions containing the wrong burden or standard of care are presumed prejudicial. *See generally*, Fabricor, Inc. v. E.I. DuPont de Nemours & Co., 24 S.W.3d 82, 100 (Mo. App. 2000) ("Given that the trial court submitted this issue under the wrong burden of proof standard, the case must be remanded for a new trial with regard to the issue of punitive damages."); *see also* Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d at 158 ("This Court has consistently held that an instruction that imposes upon a party a standard of care higher than that required by law is prejudicial, requiring a new trial . . . [and] [t]he submission of the erroneous instructions in this case . . . imposed an undue burden on [the party] and was prejudicially erroneous."); Syn, Inc. v. Beebe, 200 S.W.3d at 134 ("The Missouri Supreme Court has consistently held that imposing upon a party a standard of care higher than the law requires is prejudicial, mandating a new trial.").

The prejudice in this case is comparable to that in Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d 151. In Lopez, the defendant argued that it was prejudiced by the submission of a jury instruction that had the wrong standard of care; a standard that was higher for the defendant than it should have been. Id. at 157. The instruction given to the jury was one that required the defendant to exercise "the highest degree of care." Id. The defendant argued the proper instruction was the lower standard of "ordinary care," and this Court agreed, holding that it was error for the trial court to submit the higher standard of care to the jury. Id. On the issue of prejudice, the Court noted:

> Prejudice is ordinarily presumed when a jury instruction imposes upon a party a standard of care greater than that required by law. The presumption is rarely rebutted. This Court has consistently held that an instruction that imposes upon a party a standard of care higher than that required by law is prejudicial, requiring a new trial.

Id. at 158.

Turning to the facts of the case, the Court wrote "the instructions deprived the jury of the ability to find that an ordinarily careful person, considering all of the circumstances, would not have placed warnings on the power lines. Put another way, under the facts of this case, the jury might have determined that [defendant] was not liable because it did exercise ordinary care." Id. The Court held that the "undue burden" placed on defendant by the instruction was, therefore, "prejudicially erroneous." Id.

The analysis here is similar, albeit from the view of the plaintiff's side of the case regarding causation. Here, the instructions deprived the jury of the ability to find that, considering all the circumstances, Templemire's filing of a workers' compensation claim was a factor in W&M's decision to terminate Templemire. Put another way, the jury might have determined that W&M was liable because the filing of Templemire's workers' compensation claim was a contributing factor in the decision to terminate Templemire, even though it wasn't the exclusive, sole reason.

Appellant Templemire respectfully submits that, in view of the evidence discussed above, it is likely the jury would have made that determination and, therefore, Templemire would have prevailed under the verdict director erroneously rejected by the

trial court. *See, e.g.*, Crabtree, 967 S.W.2d at 73 ("At a minimum, and employee has suffered discrimination when the employee is discharged even in part for filing a claim.") (White, J, dissenting). Instead, W&M invoked the erroneous exclusive causation standard in closing argument [Tr. 686-689, 697-698], and the jury saw that standard staring back at them in the verdict director when they retired to deliberate. Because the submission of the exclusive causation standard imposed an undue, higher burden on Templemire than required by section 287.780, the instruction misstated the law, was prejudicially erroneous and a new trail is required. *See* Lopez, 26 S.W.3d at 158; McCullough, 349 S.W.3d at 396-97.

II. The trial court erred refusing Appellant Templemire's "pretext" jury instruction because omission of the instruction resulted in an instruction package that misstated Missouri law regarding workers' compensation retaliation, in that the jury was not directed that Appellant Templemire was entitled to a verdict if they believed W&M Welding, Inc.'s alleged nondiscriminatory reason for termination was not the true reason for termination, but rather a pretext.

Standard of Review

"Instructional error may provide a basis for the trial court to grant a new trial." Large, 670 S.W.2d at 71. "When a party claims that the trial court erroneously refused to submit an instruction to which she claims she was entitled, we review the trial court's refusal to submit the instruction for abuse of discretion." McCullough, 349 S.W.3d at

396; *see also* Fleshner, 304 S.W.3d at 97. A party is entitled to a new trial if the instructions contain "defects of substance with substantial potential for prejudicial effect." Kearbey, 240 S.W.3d at 181 (*quoting* Mal Spinrad of St. Louis, Inc., 690 S.W.2d at 463). "[T]he decision to refuse an instruction must be made on the basis of the evidence most favorable to submission of the instruction, considering all reasonable inferences and disregarding all opposing evidence. Thus, refusing to submit an instruction supported by the evidence is error." Naes v. Reinhold Dev. Co., 950 S.W.2d 681, 683 (Mo. App. 1997) (internal citation omitted).

However, "Rule 70.02(a) does not admit discretion on the part of the trial judge if the proffered instruction is supported by the evidence ***and the law*** and is in proper form." McCullough, 349 S.W.3d at 397 (emphasis in original). "To require the giving of a non-MAI, a party must prove that the MAI instructions submitted to the jury misstates the law." McCullough v. Commerce Bank, 349 S.W.3d 389, 396-97 (Mo. App. 2011).

A. The Trial Court Erred In Refusing Templemire's Pretext Instruction

In the event the Court chooses to leave the exclusive causation standard in place, Appellant believes the exclusive causation instruction still misstates the law. Following the trial court's submission of M.A.I. No. 23.13 and the exclusive causation standard, Templemire tendered the following instruction to follow the 23.13

verdict director:

> **You may find that plaintiff exercising his workers compensation rights was the exclusive cause of defendant's decision to discharge plaintiff if**

the defendant's stated reasons for its decision are not the true reasons, but are a pretext to hide retaliation against plaintiff for exercising his workers compensation rights.

[Tr. 658-659; LF 0076; A22].

The pretext instruction offered by Templemire was modeled after Eighth Circuit Model Civil Jury Instruction No. 5.95, and is consistent with Missouri case law. Missouri courts have recognized that "[p]roof that an employee was terminated solely in consequence of his exercise of his rights under the Workers' Compensation Laws is necessarily indirect because the employer is not likely to admit that retaliation was his motive." Coleman v. Winning, 967 S.W.2d 644, 648 (Mo. App. 1998). Thus, in most cases plaintiffs are required to prove by surrounding circumstances that the exclusive cause given by the employer for the termination is pretextual. Id. at 649. In Wiedower v. ACF Industries, 715 S.W.2d 303 (Mo. App. 1986), the court stated that when "an employer produces evidence of a legitimate reason for the employee's discharge, the plaintiff who is able to persuade the jury that the employer's reason is pretextual and not causal is entitled to a verdict." 715 S.W.2d at 307. Relying on Wiedower, Templemire offered the above pretext instruction, but it was erroneously rejected by the trial court. [Tr. 659-660; LF 0076; A22].

"[T]he decision to refuse an instruction must be made on the basis of the evidence most favorable to submission of the instruction, considering all reasonable inferences and disregarding all opposing evidence. Thus, refusing to submit an instruction supported by

the evidence is error." Naes, 950 S.W.2d at 683 (internal citation omitted). Templemire's position that W&M's stated reason for termination (insubordination) was pretextual, and not the true reason, was supported the substantial evidence set forth above in the previous section. Templemire respectfully submits that submitting M.A.I. No. 23.13 to the jury without the pretext instruction misstated the law, misdirected, misled, and/or confused the jury, and Templemire was prejudiced as a result. *See* Kearbey, 240 S.W.3d at 181 (court of appeals will reverse trial court where "the instruction misdirected, misled, or confused the jury, and there is a substantial indication of prejudice."); McCullough v. Commerce Bank, 349 S.W.3d at 396-97 ("To require the giving of a non-MAI, a party must prove that the MAI instructions submitted to the jury misstate the law.").

The problem with refusing the instruction is that the idea of "pretext" and its legal significance in a case of discrimination or retaliation is not easily understood by a jury without instruction by the trial court. The jury has no instruction on the importance of the veracity of the employer's alleged reasons for termination and how it fits with and rebuts the plaintiff's proof.

Pretext can be argued by counsel, but counsel's argument does not provide the jury the law. And the exclusive causation standard is so high—and the words so conspicuous within M.A.I. No. 23.13—that when the jury retires to the jury room they likely forget arguments about pretext and focus only on the exclusive causation language in their hands. Without an instruction directing the jury on the law regarding pretext in Missouri, they are directed to find that if there is **any reason for the termination other**

than retaliation, even pretextual, the defendant is entitled to a verdict. Even a pretextual reason is an "other reason" and, therefore, retaliation is not exclusive. This is a misstatement of the law. In other words, the language of M.A.I. No. 23.13 may leave the jury confused about the weight to be afforded to pretext and unable to understand that pretextual reasons for termination allow for a finding that the filing of a workers' compensation claim was the exclusive cause of the termination.

The issue of a pretext instruction in an MHRA case was very recently addressed by the Western District Court of Appeals in McCullough, 349 S.W.3d 389. In McCullough, the plaintiff filed suit for age and race discrimination and, at trial, offered a pretext instruction that was substantially similar to the instruction offered by Templemire here. Id. at 398. The trial court refused to submit the instruction, reasoning that it was inconsistent with the MHRA. Id. The Court of Appeals held that the trial court did not abuse its discretion, and that the trial court may have thought that the pretext instruction was a reversion back to the burden-shifting analysis of federal discrimination cases that was rejected by the Supreme Court of Missouri in Daugherty, 231 S.W.3d 814. Id. at 399. The Court did not, however, hold that the instruction was necessarily improper and, in any event, its holding should be limited to cases under the MHRA (which has the contributing factor standard). The Court further noted that plaintiff did not adequately address the issue of prejudice to allow the Court to determine whether the denial of the instruction prejudiced the plaintiff. Id.

Neither of those concerns is present in this case. First, the pretext instruction is entirely consistent with the **current** state of Missouri law on proof of workers'

compensation retaliation.[5] In cases under section 287.780, Missouri courts continue to apply the burden shifting analysis: "Once the plaintiff has produced sufficient evidence to show that the four elements of retaliatory discharge have been met, the burden shifts to the employer to rebut the plaintiff's evidence by showing that there was a legitimate reason for the discharge." Coleman v. Winning, 967 S.W.2d 644, 648 (Mo. App. 1998). Although mentioned before, it bears repeating: "Even though an employer produces evidence of a legitimate reason for the employee's discharge, the plaintiff who is able to persuade the jury that the employer's reason is pretextual and not causal **is entitled to a verdict**." Wiedower, 715 S.W.2d at 307 (emphasis added). Without a pretext instruction, the jury is not properly instructed on the law, the weight to be afforded to pretext and that pretext requires a verdict for the plaintiff. The instructions provide the jury with the law, and Templemire respectfully submits that failure to instruct the jury on the law as stated in Wiedower was error.

Second, in this case Templemire was prejudiced. The instruction was supported by the considerable evidence of pretext set out above. *See* Kearbey, 240 S.W.3d at 181 ("court views the evidence and all reasonable inferences therefrom from the standpoint most favorable to the party offering the instruction."). For example, it was uncontroverted that W&M did not comply with its progressive discipline policy and did not warn Templemire prior to termination. [Tr. 287, 318-320]. Pretext was also

[5] The current state of the law, which Appellant Templemire challenges in this appeal, is the "exclusive causation" standard of M.A.I. No. 23.13.

demonstrated by Templemire's evidence that one employee—who had not filed a workers' compensation claim—was given multiple warnings for actually leaving work (not just taking a break) on multiple occasions, and was not terminated on the spot. [Tr. 318-319]. In addition, Templemire presented evidence that the same employee was rehired after quitting because he felt he would have failed a drug test in violation of company policy. [Tr. 318-319]. There was evidence that Templemire was not insubordinate in flatly refusing to do the job assigned, but rather planned to do the job after resting his foot in accordance with his doctor's orders following a morning of working on his feet. [Tr. 476-479]. Finally, the jury was shown the claim notes memorializing Mr. McMullin's "tyrant [sic] about [Templemire] milking his injury." [Tr. 396; Exhibit 7; A40]. All of this evidence points to the conclusion that "insubordination" was not the true reason for Templemire's termination.

Unfortunately, the jury was not instructed on the significance of this evidence of pretext and its relationship to the elements of Templemire's case. *See* Naes, 950 S.W.2d at 683 ("refusing to submit an instruction supported by the evidence is error."). They were not instructed that if they did not believe the employer's stated reason Templemire was "entitled to a verdict." Wiedower, 715 S.W.2d at 307. They were, instead, left to believe that if some other cause—no matter how weak or unsupported—contributed to the termination, the exclusive causation instruction required a verdict for W&M. The failure to correct any confusion and instruct the jury on the law of pretext was prejudicial and materially affected the trial. *See* Kearbey, 240 S.W.3d at 181 (A party is entitled to a

new trial if the instructions contain "defects of substance with substantial potential for prejudicial effect.").

For the foregoing reasons, Appellant Templemire respectfully submits that the failure to tender Templemire's pretext instruction was reversible error requiring a new trial.

CONCLUSION

The exclusive causation standard is contrary to the plain language of section 287.780 and conflicts with the protections provided to Missouri employees under the other exceptions to the employment-at-will doctrine. Appellant Templemire respectfully requests that this Court hold that the exclusive causation standard is contrary to the plain language of section 287.780 and the intent of the legislature and should be abandoned in favor of the contributing factor standard applicable to Missouri's other exceptions to the employment-at-will doctrine. The trial court's rejection of Appellant Templemire's verdict directors and the "contributing factor" standard, and the trial court's giving of unmodified M.A.I. No. 23.13, constitutes prejudicial error. Alternatively, when the trial court decided to give unmodified M.A.I. No. 23.13, it was prejudicial error for the trial court not to instruct the jury on the significance of pretext under Missouri law.

WHEREFORE, Appellant John Templemire prays that the judgment entered by the trial court below be reversed, and that the cause be remanded for new trial.

Respectfully submitted,

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CERTIFICATION

Pursuant to Mo.R.Civ.P. 84.06(c), I hereby certify that Appellant's Substitute Brief includes the information required by Rule 55.03, complies with the limitations in Rule 84.06(b) and contains 12,214 words excluding the parts of the brief exempted by Rule 84.06(b), according to the Microsoft Word system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that on April 8, 2013, a true and correct copy of the foregoing Substitute Brief was filed electronically using the Missouri Courts e-Filing System, which provided notice and service of the filing to counsel of record for defendant:

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